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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 392

AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING CO., and PERMIAN BASIN RADIO CORPORATION,

Appellants,

against

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

CAROL J. HEAD
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Cases Cited

STATUTES CITED

IN THE

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of New Mexico, entered on April 11, 1962, affirming the judgment of the District Court of Lea County, State of New Mexico, and submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINION BELOW

The Opinion of the Supreme Court of the State of New Mexico is reported at 70 N.M. 90, 370 P. 2d 811, and is also set forth in the record (R. 126-136). A copy of that opinion

is attached hereto as Appendix A. The order of the New Mexico Supreme Court affirming the judgment of the District Court of Lea County, State of New Mexico, is also set forth in the record (R. 137), and a copy of that order is attached hereto as Appendix B. No opinion has been filed by the New Mexico District Court. The District Court's oral ruling upon the trial of the case is set forth in the record (R. 45-47), as are its decision (findings of fact and conclusions of law) (R. 28-31) and its final decree (R. 32-33). Copies of such oral ruling, findings of fact and conclusions of law and final decree are attached hereto as Appendix C.

JURISDICTION

This suit was brought in the New Mexico District Court to enjoin appellants from accepting and publishing certain advertising from Abner Roberts under Section 67-7-13, New Mexico Statutes Annotated, 1953 Compilation (hereinafter cited as "N.M.S.A., 1953"). The text of Section 67-7-13 is attached hereto as Appendix D. The judgment of the Supreme Court of New Mexico (Appendix B) was entered on April 11, 1962, and notice of appeal by appellants (R. 140-142) was filed in that court on July 6, 1962. The jurisdiction of this Court of this appeal is invoked under 28 U.S.C. §1257(2). The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case: *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Greyhound Lines* v. *Mealey*, 334 U. S. 653; *Marcus* v. *Search Warrant*, 367 U. S. 717.

QUESTIONS PRESENTED

Whether Section 67-7-13 of N.M.S.A. 1953, as applied to appellants, residents of New Mexico who in New Mexico are engaged in interstate commerce through the publishing of a newspaper and the operation of a radio (inadvertently stated as television in the notice of appeal) station, respec-

tively, having circulation and broadcast coverage in both New Mexico and States other than New Mexico, in prohibiting, and the action of the New Mexico Courts thereunder in enjoining, appellants from publishing and disseminating in the State of New Mexico certain commercial advertising of eye glasses, lenses and frames and services relating thereto by a resident of the State of Texas practicing optometry and offering such advertised articles and services for sale only in the State of Texas, is:

(1) unconstitutional as an undue and unreasonable burden on interstate commerce under the "Commerce Clause" of the United States Constitution, Article I, Section 8, clause 3.

(2) unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution, either as an abridgment of their privileges and immunities as citizens of the United States, or as a deprivation of their property without due process of law, or as a denial to them of equal protection of the laws.

STATUTES INVOLVED

Article I, Section 8, clause 3 of the United States Constitution provides as follows:

> "**Section 8.** The Congress shall have Power***
>
> **To regulate** Commerce with foreign Nations, **and among** the several States, and with the Indian **Tribes;**"

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 67-7-13 of N.M.S.A., 1953 is set forth in Appendix D hereto. Subsection 67-7-13 (m) thereof provides as follows:

> "67-7-13. Offenses-Penalties.—Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than $50.00 nor more than $200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than $200.00 nor more than $500.00, or imprisonment in the county jail for not less than 90 days nor more than one (1) year, or both such fine and imprisonment. All fines thus received shall be paid into the common school fund of the county in which such conviction takes place.
>
> • • • •
>
> (m) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discount to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import."

STATEMENT OF THE CASE

Appellant Agnes K. Head (hereinafter called "Head") is a resident of Hobbs, Lea County, New Mexico, where she does business as Lea County Publishing Company, publishing a newspaper called the "Hobbs Flare". In addition to its circulation in New Mexico this newspaper has circulation in thirteen states and the District of Columbia, including circulation in some twenty-seven communities in

the State of Texas. Appellant Permian Basin Radio Corporation (hereinafter called "Permian"), a corporation, owns and operates in Hobbs, Lea County, New Mexico, Radio Station K-HOB, having broadcast coverage in New Mexico and Texas. It receives news coverage from certain cities in Texas and handles advertising from national advertising concerns and for firms and merchants situated in Texas (R. 28-29, 44-45, 48-53).

Appellee is an agency of the State of New Mexico and is charged with the administration of New Mexico's laws (Sections 67-7-1 through 67-7-14, N.M.S.A., 1953) relating to the practice of optometry (R. 28-29).

In September 1960, appellee commenced an action in the District Court of Lea County, New Mexico against Appellants Head and Permian and also Abner Roberts (hereinafter called "Roberts") and KWEW, Inc. (hereinafter called "KWEW"), seeking to enjoin Appellants Head and Permian and KWEW, which operates in Hobbs, Lea County, New Mexico, Radio Station KWEW, from accepting and publishing in New Mexico certain advertising by Roberts, an optometrist residing and practicing optometry in Gaines County, Texas, just across the Texas-New Mexico border and a few miles east of Hobbs, which quoted prices or discounts on eyeglasses in alleged violation of Section 67-7-13, N.M.S.A., 1953 (R. 1-7; 28-29). Roberts, who is also licensed to practice optometry in New Mexico, but now resides and practices in Texas, did not appear, although he was apparently served with process in Texas (R. 15), and on January 4, 1961 the District Court entered a decree enjoining him from price advertising eyeglasses in New Mexico. A copy of this decree, which was served on Roberts in Texas on January 20, 1961 (R. 20), is set forth in the record (R. 15-16) and is attached hereto as Appendix C.

Appellants Head and Permian and KWEW appeared in the action and in their answers they raised, among others,

the defenses that enforcement of Section 67-7-13, N.M.S.A., 1953 against them as sought by appellee would deny them equal protection of the laws and deprive them of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and would constitute an undue burden on and discrimination against interstate commerce (R. 8-9; 13-14; 18-19). By requested conclusions of law these defenses were again asserted (R. 22-23).

Following appellee's motion for summary judgment, the matter was heard by the District Court on January 19, 1961, the evidence presented consisting of certain stipulations, including stipulations that appellants Head and Permian and KWEW had accepted price advertising from Roberts and would continue to do so unless enjoined by the court. In announcing its ruling that an injunction would issue as prayed, the District Court stated that Roberts was a nonresident of New Mexico and beyond the jurisdiction of that Court, that his activities could not be controlled by the Court, and that Texas had no such act as appellee sought to enforce. However, the District Court further stated that Roberts' acts were illegal and that the other defendants were engaged in a conspiracy to assist him and should be restrained (R. 45-47, Appendix C).

In its decision the District Court specifically reached conclusions of law that the enforcement of Section 67-7-13 and the enjoining of appellants as done, did not offend the Constitution of the United States. (R. 30, Appendix C). Accordingly, on April 7, 1961 the District Court filed its final decree perpetually enjoining and restraining appellants Head and Permian and KWEW "from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eye glasses. . . " (R. 32-33, Appendix C).

Appellants Head and Permian and KWEW appealed the decision of the District Court to the New Mexico Supreme Court (R. 34-37), raising before that Court the same defenses under the United States Constitution as had been raised below (R. 62-78, 108-123). Roberts, not having appeared, did not appeal. The New Mexico Supreme Court, after written briefs and oral argument were presented, affirmed the District Court on April 11, 1962.

In its written opinion (R. 126-136, Appendix A), the New Mexico Supreme Court considered appellants' defenses under the United States Constitution at length and rejected each of them. The Court concluded that Congress had not preempted the entire field of advertising in interstate commerce and that there was no conflict between federal legislation relating to false advertising and Section 67-7-13. It further construed that section as containing no restriction directed toward the regulation of interstate commerce, stating that "it merely places a restriction, in the exercise of its police power, on the manner in which advertising in the field of optometry can be done within this state alone by 'any person' and 'by any means.'" The Court reasoned as follows:

> "* * * * Enjoining appellants from accepting and disseminating price-advertising by their news media in New Mexico for the benefit of a local business in Gaines County, Texas, does not affect the free flow of interstate commerce with respect to proper subjects of that commerce, or contracts for the dissemination of national or foreign news and information regarding proper subjects of commerce, as defined in the cases cited by appellants. We are in agreement with the line of reasoning expressed in *State v. J. P. Bass Publishing Company*, 104 Me. 288, 71 A. 894, a state in which the sale or keeping for sale of intoxicating liquor was illegal, which involved a valid exercise of the police power prohibiting the advertising within the state of liquor sold or kept for sale without the state. The court said:

> '. . . If the state cannot wholly prevent the mischief of such advertisements by excluding from the state all newspapers containing them wherever published, it may yet prevent such increase and spread of the mischief as would result from such advertisements being printed in newspapers published within the state territory. It may to that extent control the conduct of printers and publishers within its own territory. . . . '"

The New Mexico Supreme Court further held that the statutory regulation in question did not violate the "contract clause", "due process clause" or "equal protection" clause of the United States Constitution, and concluded that "enjoining the appellants from aiding and abetting a nonresident in the violation of a law of New Mexico is as essential to the administration of the provisions of our statutes relating to the practice of optometry for the health and welfare of our citizens as would be the prosecution of a resident optometrist for the same offense."

Appellants Head and Permian filed their notice of appeal of that decision to this Court with the Clerk of the Supreme Court of New Mexico on July 6, 1962 (R. 140-142). KWEW has apparently not appealed that decision.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal have not heretofore been decided by this Court. In the few instances in which similar issues have been considered by lower federal or state courts, the decisions have been conflicting and they have been rendered with respect to distinguishable circumstances. These issues are of substantial importance not only to publishers and broadcasters, but to all the many persons who have occasion to advertise their services or wares or other matters in newspapers, magazines and other publications having multistate circulation or by radio or

television broadcasts having multistate coverage. They are of substantial importance not only to appellants or residents of New Mexico and Texas, but to others similarly situated in all states.

In this case the State of New Mexico has perpetually enjoined appellants from accepting and publishing in New Mexico, from where they normally publish and broadcast, price advertising of eyeglasses by Abner Roberts even though Roberts resides and practices optometry in Texas, appellants' newspaper and radio station have circulation and broadcast coverage in Texas, and Texas does not impose like restrictions on advertising by optometrists. By virtue of §67-7-13 N.M.S.A., 1953, New Mexico, through its legislature and courts, would compel appellants to maintain places of business not only in New Mexico but in Texas in order to disseminate advertising by an optometrist residing and practicing in Texas.

The fact that New Mexico has several other statutes purporting to restrict the right to advertise or placing conditions thereon emphasizes the importance of this case. Thus, New Mexico statutes (N.M.S.A., 1953) provide variously that it is unlawful for any person engaged in any business or profession to advertise that sales tax is not included in the price of the thing advertised (§72-16-7); that any person who may advertise second hand watches shall state that they are second hand (§40-21-30); that it is unlawful for any merchant to advertise any item of merchandise with a limitation upon the number of such items which any purchaser may buy at the advertised price (§45-1-5); and that no owner or keeper of a stallion not of pure breeding shall permit the printing of any newspaper or other advertisement calling attention to the stallion as a breed unless the advertisement has the words "grade" or "scrub" before the word "stallion" in one inch type (§47-11-14).

Texas has no identical statutes, although it does have several statutes of its own restricting advertisements. This fact emphasizes the importance of the issue of whether one state can lawfully restrict advertising with advertising media normally engaged in serving not only that state but other states whose laws may be different and into which residents of the former may travel for commercial purposes. If New Mexico can validly restrict appellants' publishing and broadcasting of price advertisements on eyeglasses, then it surely can as easily restrict their dissemination of advertising placed by non-residents but within the literal proscriptions of the foregoing statutes. If every state could thus restrict advertising by non-residents with media having interstate circulation or coverage, the disruption to interstate commerce would be great and far reaching.

The wisdom of the New Mexico statute regulating the practice of optometry is not here in question, for in *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, this Court upheld an Oklahoma statute regulating the practice of optometry and restricting advertising by optometrists. There are significant differences between that case and appellants' case. The Oklahoma statute restricted only advertising by opticians and had a specific proviso to the effect that the Act should not render any newspaper or other advertising media liable for publishing any advertising furnished them by a vendor (348 U. S. 483, 488, n 2). Moreover, the complaining parties were Oklahoma residents complaining about the effect of the statute in Oklahoma and no issue of interstate commerce was involved or considered.

But there is a fundamental issue of interstate commerce involved in appellants' case. Appellants are engaged in interstate commerce and the very advertising they have been enjoined from disseminating is a part of that commerce. *Lorain Journal* v. *U. S.*, 342 U. S. 143; *Farmer's Guide Co.* v. *Prairie Co.*, 293 U. S. 268; *Fisher's Blend*

Station v. *Tax Commission*, 297 U. S. 650; *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, C.A. 3rd Cir., Cert. Den. 340 U. S. 929.

The clear effect of the statute in question and the action of the New Mexico courts in enjoining appellants thereunder is the burdening of interstate commerce. This burden is as undue and unreasonable as it is real, and should not stand.

In holding that no undue burden on interstate commerce was here involved, the New Mexico Supreme Court stated that it was in agreement with the line of reasoning expressed in *State* v. *J. P. Bass Publishing Company*, 104 Me. 288, 71 A. 894. In that case the Supreme Court of Maine upheld the defendant's conviction for publishing in Maine an advertisement for the sale of intoxicating liquor placed by a firm in Massachusetts. In Maine the sale and advertising for sale of liquor was illegal, whereas in Massachusetts it was legal. Rejecting a defense based on the commerce clause of the United States Constitution, Article I, Section 8, Clause 3, the Court affirmed the conviction on the basis of *Delamater* v. *South Dakota*, 205 U.S. 93. It considered that even if it could not prevent an out of State newspaper advertising liquor from coming into Maine, it could prevent such advertising by those within its own territory.

Intoxicating liquor historically has been treated as a special category as regards the right of the states to regulate its flow in interstate commerce. This distinction was noted by this Court in *Delamater v. South Dakota*, *supra*, where the Court stated that as the matter involved liquor, South Dakota's conviction of Delameter for soliciting liquor sales in South Dakota without a license did not require the Court to determine whether the restraints of the South Dakota statute would be a direct burden on interstate commerce if generally applied to subjects of commerce (205

U.S. 93, 97). Cases involving interstate commerce in liquor are not controlling authority as to other subjects of commerce, *Carter* v. *Virginia*, 321 U.S. 131; *State* v. *Salt Lake Tribune Pub. Co.*, 68 Utah 87, 249 Pac. 479, and the reliance of the New Mexico Supreme Court thereon is misplaced.

More in point is the *Salt Lake Tribune* case, *supra*. In that case the respondent published in Utah a newspaper having circulation in other states. The Supreme Court of Utah reversed the respondent's conviction for having published an advertisement for cigarettes in violation of a statute prohibiting such advertisement but allowing the sale of cigarettes upon proper licensing. The court held that the statute as applied constituted an undue interference with interstate commerce. In so holding the court distinguished *State* v. *J. P. Bass Publishing Company*, 104 Me. 288, 71 A. 894 because that decision was concerned with advertisements of liquor, which was not within the protection of the commerce clause, and relied instead on *Post Printing & Publishing Co.* v. *Brewster*, 246 Fed. 321 (D. Kan.).

In the latter case the United States District Court for Kansas held that a newspaper publisher who published in Missouri but circulated its papers in Kansas, could not be prohibited by Kansas from selling in Kansas papers containing cigarette advertisements. The advertising of cigaretts was lawful in Missouri but not in Kansas.

The foregoing *Bass*, *Salt Lake Tribune* and *Post Printing* cases are the only cases in which the issues of interstate commerce similar to those involved in appellants' case have been meaningfully considered. Compare *Little* v. *Smith*, 124 Kan. 237, 257 Pac. 959; *State* v. *Packer Corp.*, 77 Utah 500, 297 Pac. 1013, aff'd. 285 U.S. 105. Not only do these cases split on the question of prohibiting advertising in interstate commerce, but they raise a fundamental subsidiary question as to whether a state may not prohibit the circulation of a

newspaper printed outside the state and carrying certain advertising, but may nevertheless prohibit the circulation of a newspaper printed within the state carrying identical advertising. Clarification of both of these issues by this Court is both desirable and needed.

By preventing appellants from carrying advertising by Roberts, New Mexico has curbed Roberts' advertising not only in New Mexico, but in Texas and other states. In effect, therefore, by this action New Mexico has denied to the residents of Texas and other states information as to the prices of Roberts' eyeglasses. That New Mexico may consider that the welfare of its residents demands that such information be denied them cannot entitle it to impose its policy on Texas or any other state. In *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, this Court held that New York could not, as a condition to licensing him to sell milk in New York, compel a person to pay a minimum price set by New York, for milk purchased in Vermont. The Court stated that the price to be paid producers in Vermont was Vermont's concern, not New York's, and that such a regulation was an undue burden on interstate commerce. What the Court there said as to the purpose of the commerce clause is pertinent here:

> "Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, § 8, clause 3. 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' *International Textbook Co.* v. *Pigg*, 217 U.S. 91, 112; and see *Brennan* v. *Titusville*, 153 U.S. 289; *Brown* v. *Houston*, 114 U.S. 622; *Webber* v. *Virginia*, 103 U.S. 344, 351; *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U.S. 75, 79. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when

the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the Hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in custom barriers and other economic retaliation.' Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; The Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, §259. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." 294 U.S. 511, 522.

No less than in the *Seelig* case does the action of New Mexico here in question offend the commerce clause and unduly burden interstate commerce. No less there than here is the door opened to rivalries and reprisals meant to be averted by the commerce clause.

Further, in advertising with appellants Roberts reaches not only residents of Texas and other states but residents of New Mexico. Whatever may be the right of New Mexico to limit its residents' activities in New Mexico, it cannot limit their lawful activities in other states. As citizens of the United States, they have the clear and unobstructible right to purchase in Texas eyeglasses from Roberts. *Allgeyer* v. *Louisiana*, 165 U.S. 578; *St. Louis Compress Co.* v. *Arkansas*, 260 U.S. 346. New Mexico, therefore, clearly could not prevent its residents from traveling between New Mexico and Texas for the lawful purpose of purchasing eyeglasses from Roberts. *Edwards* v. *California*, 314 U.S. 160. Yet, the effect of its action is the same. By foreclosing from its residents advertising information as to articles legitimately for sale in Texas, New Mexico just as effec-

tively prevents its residents from traveling to Texas for that purpose as if they were physically restrained. This too unduly burdens interstate commerce and appellants are among the victims of that burden.

In addition, appellant Permian is a radio station licensed by the Federal Communications Commission. By the Communications Act of 1934, 47 U.S.C. §151 et seq., Congress has occupied the field of regulation of radio broadcasting in its entirety. *Scripps-Howard Radio* v. *Commn.*, 316 U.S. 4; *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, C.A. 3rd Cir., cert. den. 340 U.S. 929. Appellant Permian, enjoined from carrying advertising, has been censored no less than Dumont in the *Dumont* case, where the court held that Pennsylvania's attempts to censor films shown on television were foreclosed by federal preemption.

In regulating what advertising a radio station may engage in, New Mexico has entered an area reserved for federal regulation, and its incursion should not stand. Compare *Farmers Union* v. *WDAY*, 360 U. S. 525.

It is significant that the District Court in the *Dumont* case stated that it considered Pennsylvania's efforts to censor films shown on television an undue and unreasonable burden on interstate commerce. 86 F. Supp. 813, 816.

The action of the New Mexico courts in enjoining appellants from disseminating price advertising by Roberts is more than an undue burden on interstate commerce. As to appellant Head, an individual, it violates her privileges and immunities as a United States citizen as protected by the Fourteenth Amendment. As was stated in *Crutcher* v. *Kentucky*, 141 U. S. 47, 57, "To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." Yet, although no reasonable basis exists

for denying her privilege of engaging in interstate commerce in carrying price advertising of a Texas optometrist, appellant Head may now engage in such commerce only under the cloud of being found in contempt of the New Mexico District Court by which she was enjoined. Compare *Lovell* v. *Griffin*, 303 U. S. 444; *Grosjean* v. *American Press Co.*, 297 U. S. 233.

Moreover, New Mexico has not sought to enjoin publishers of newspapers and operations of radio stations who publish and broadcast in Texas and whose circulation and broadcast coverage include New Mexico from disseminating Roberts' price advertising. In singling out appellants for application of Section 67-7-13 N.M.S.A., 1953, New Mexico has denied to appellants equal protection of the laws under the Fourteenth Amendment to the Constitution. *Little* v. *Smith*, 124 Kan. 237, 257 Pac. 959. Compare *State* v. *Packer Corp.*, 77 Utah 500, 297 Pac. 1013, aff'd. 285 U. S. 105.

Above all, New Mexico's statute, as here applied by its courts, deprives appellants of their property without due process of law in violation of the Fourteenth Amendment. As this Court expressed in *Nebbia* v. *New York*, 291 U. S. 502, 525,

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."

Section 67-7-13 N.M.S.A., 1953, as here applied, does not meet this test. That New Mexico may have a legitimate interest in protecting its residents' eyesight does not justify its regulation of appellants to the extent that they are precluded from carrying in interstate commerce advertising of an optometrist resident and practicing in a neighboring state. See also *Allgeyer* v. *Louisiana*, 165 U. S. 578; *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346.

It is submitted that the Supreme Court of New Mexico erred in affirming the decision of the district court enjoining appellants and that this appeal presents important and substantial questions of federal law relating to interstate commerce and the rights of those engaged therein which should be decided by this Court.

Respectfully submitted,

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Appendix A

IN THE

Supreme Court of the State of New Mexico

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,
Plaintiff-Appellee.

vs.

ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING CO.; PERMIAN BASIN RADIO CORPORATION; and KWEW, INC.,
Defendants-Appellants.

No. 7001
SUPREME COURT
OF NEW MEXICO
Filed
Apr. 11, 1962
Lowell C. Green,
Clerk

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY

BRAND, JUDGE

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OPINION

COMPTON, Chief Justice.

This is an appeal from a final decree perpetually enjoining and restraining defendants Agnes K. Head, d/b/a Lea County Publishing Company, publisher of the newspaper Hobbs Flare; Permian Basin Radio Corporation, owner and operator of radio Station KHOB; and KWEW, Inc., owner and operator of radio station KWEW, all of Hobbs, New Mexico, from accepting, disseminating and publishing within the State of New Mexico advertising of any nature from defendant, Abner Roberts, a resident of Texas, which quotes prices or terms on eye glasses, spectacles, lenses, frames, or mountings, or quotes discounts to be offered on same, or which quotes moderate prices, or words of similar import, as prohibited by the provisions of § 67-7-13, N.M.S.A. 1953.

The trial court found that the defendants, other than Roberts, in publishing the advertising, were aiding and abetting in and encouraging the violation of this section of the statute and that enjoining them from so doing does not offend either the Constitution of the United States or the Constitution of New Mexico.

The pertinent portions of the statute read as follows:

> "67-7-13. OFFENSES-PENALTIES.—Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than $50.00 nor more than $200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than $200.00 nor more than $500.00, or imprisonment in the county jail for not less than 90 days nor more than one (1) year, or both such fine and imprisonment. All fines thus received shall be paid into the com-

mon school fund of the county in which such conviction takes place.

* * * *

"(m) Advertising by any means whatsoever the quotation of any prices or terms on eye glasses, spectacles, lenses, frames or mountings or which quotes discount to be offered on eye glasses, spectacles, lenses, frames or mountings or which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import."

Abner Roberts, a defendant below but not a party to this appeal, resides and practices optometry in Gaines County, Texas, located approximately 4 miles east of Hobbs, New Mexico, and in the trade area served by the news media of the other defendants who are the appellants here and who have their principal places of business in Hobbs, New Mexico. Roberts placed his advertisements with them by telephone.

It is conceded by appellants on this appeal that if Roberts were a resident of, or practicing optometry in, New Mexico the above statute would be applicable to and enforceable against him. But it is appellants' contention that because they are engaged in interstate commerce the statute upon which this action is based constitutes an obstruction on such commerce by restraining them from engaging in interstate commerce with a citizen of Texas lawfully practicing optometry in Texas and that, therefore, (1) the statute in question violates the provisions of Article I, Section 8, Paragraph 3 of the Constitution of the United States relating to interstate commerce; and (2) that it is an unreasonable infringement of personal property rights, an unwarranted oppressive interference with the liberty of contract and violates the Fourteenth Amendment of the Constitution of the United States and Article II, Section 18 of the Constitution of New Mexico.

It is the contention of the appellee, on the other hand, that the regulation of interstate commerce is not involved in this action since the New Mexico statute as well as the decree of the court below seek only to control conduct in New Mexico in the legitimate exercise of its police power.

In support of appellants' first contention that this statute violates the commerce clause in its application to them, appellants have cited cases which define interstate commerce and conclude that newspapers with circulation in other states, and radio stations whose programs are received in other states, are engaged in interstate commerce. We have no quarrel with the decisions in these cases insofar as they deal with the prohibition by a state of *all* advertising relating to a commodity moving in interstate commerce into its state from another state for legal sale in its original package, or with direct burdens on, or direct interference with, the publication and circulation of newspapers in interstate commerce or the privilege of doing business in interstate commerce, or with state statutes which conflict with federal legislation where Congress has fully occupied the field. But appellants have brought to our attention no authority for the proposition that persons engaged in interstate commerce are under no circumstances subject to valid legislation of the state in which they are doing business enacted in the exercise of its police power for the health and welfare of its citizens.

The Legislature of New Mexico enacted Section 67-7-13, supra, to protect its citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes. That this is a valid exercise of the police power of the state is not questioned in this action and, in view of the decisions cited by appellee upholding the constitutionality of similar statutes in other states, we do not think it can be. *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483,

75 S. Ct. 461; *Ritholz* v. *Indiana State Board of Registration and Examination in Optometry* (USDC N.D. Ind.), 45 F. Supp. 423; *Abelson's Inc.* v. *New Jersey State Board of Optometrists*, 5 N. J. 412, 75 A. 2d 867; *City of Springfield* v. *Hurst*, 144 Ohio St. 49; 56 N. E. 2d 185; *Commonwealth* v. *Ferris*, 305 Mass. 233, 25 N. E. 2d 378; *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S. E. 2d 210; *Seifert* v. *Buhl Optical Company*, 276 Mich. 692, 268 N. W. 784; *State* v. *Rones*, 223 La. 839, 67 So. 2d 99 and *Bedno* v. *Fast*, 6 Wis. 2d 471, 95 N. W. 2d 396.

Article I, Section 8 of the Constitution of the United States delegates to Congress the authority to regulate interstate commerce. And it is settled that newspapers and radio stations are instrumentalities of interstate commerce within the meaning of that provision. It is nevertheless established that the states are not wholly precluded from exercising their police power in matters of local concern even though they may thereby indirectly affect interstate commerce. *Kroeger* v. *Stahl*, (CCA. 3rd Cir.), 248 F. 2d 121; *Huron Portland Cement Company* v. *City of Detroit*, 362 U. S. 440, 80 S. Ct. 813; *Simpson* v. *Shepard*, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, and *Florida Lime and Avocado Growers, Inc.* v. *Paul*, (DC, N.D. Cal.) 197 F. Supp. 780. This police power extends to the right of the state to regulate trade and callings concerning public health. *Polhemus* v. *American Medical Association*, (CCA 10th Cir.), 145 F. 2d 357.

It is clear that state action affecting interstate commerce is precluded in three types of situations: (1) where state action directly burdens interstate commerce; (2) where state action conflicts with federal regulations; and (3) where Congress has evidenced an intent to completely pre-empt the area of regulation involved. *Western Live Stock* v. *Bureau of Revenue*, 41 N. M. 141, 65 P. 2d 863; *Kelly* v.

State of Washington, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3; *Central Illinois Pub. Serv. Co. v. Illinois Commerce Commission*, 18 Ill. 2d 506, 165 N. E. 2d 322; and *Pennsylvania R. Co. v. Department of Public Utility Com'rs.*, 14 N. J. 411, 102 A. 2d 618.

The issues presented in this case, therefore, are: (1) Has the prohibition in Section 67-7-13(m), supra, against price-advertising in New Mexico in the field of optometry, as a valid exercise of the police power of the state, been superseded by federal legislation relating to advertising in interstate commerce with which it is in conflict, and (2) if Congress has not pre-empted the field of interstate advertising in the optometric field, does the enjoining of appellants from accepting and disseminating price-advertising in New Mexico from a non-resident obstruct or directly interfere with interstate commerce?

With respect to (1) above, the Federal Trade Commission Act, Title 15, Section 52, U.S.C.A., prohibits the dissemination, or causing to be disseminated, of any *false* advertising in interstate commerce, either directly or indirectly to induce, or which is likely to induce, the purchase of foods, drugs, devices or cosmetics. In holding that this is not a pre-emption by Congress of the entire field of advertising in interstate commerce so as to preclude this state from exercising its police power for a matter of local health protection, we adopt the holding in *Bedno v. Fast*, supra, wherein the court in dealing with this same question, at least insofar as newspaper advertising is concerned, said:

> . . . A reading of the statute [15 U.S.C.A. Sec. 52] will show that it prohibits only *false* advertising as an unfair or deceptive act in commerce. Congress has not seen fit to include within the scope of federal legislation the dissemination of truthful advertising. Thus, the federal act does not cover the subject matter of

> Sec. 153.10 Stats. [Wisconsin statute similar to that of New Mexico] and does not by pre-emption preclude the state from so exercising its police power. . . . "

With respect to radio broadcasting, Congress has occupied the field by virtue of the Federal Communications Act of 1934. *Regents of New Mexico* v. *Albuquerque Broadcasting Company*, (CCA 10th Cir.), 158 F. 2d 900. The express underlying purpose of this Act is to protect the public interest in interstate communication. Section 303 of Title 47, U.S.C.A. gives the Commission authority to suspend the license of any operator who transmits communications containing profane or obscene words, language, or meaning, or false or deceptive signals or communications. Section 1464, Title 18, U.S.C.A. provides for the fining and imprisonment of any person who utters any indecent, obscene or profane language by means of radio communication. These are the federal provisions with which the Pennsylvania statute was in conflict in the case of *Allen B. Dumont Laboratories* v. *Carroll*, (CCA Pa.), 184 F. 2d 153 cited by appellants. We find no such conflict in the case before us. The Federal Communications Act does not attempt to regulate truthful advertising by radio in interstate commerce.

In *Kelly* v. *State of Washington*, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3, the court stated:

> " . . . The principal is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only wherein the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

The intention to supersede the exercise by the state of its police powers as to matters not covered by federal legislation is not to be implied unless the Act of Congress, fairly interpreted, is in conflict with the law of the state. In other

words, the intention of Congress to regulate exclusively under the commerce clause will not be implied unless the federal measure is plainly inconsistent with state regulation of the same subject. *Savage* v. *Jones*, 225 U. S. 501, 56 L. Ed. 1183; *Atlantic Coast Line Railroad Company* v. *Georgia*, 234 U. S. 280, 58 L. Ed. 1312; *Carey* v. *South Dakota*, 250 U. S. 118, 63 L. Ed. 886; *Atchison, Topeka & Santa Fe Railway Company* v. *Railroad Commission of California*, 283 U. S. 380, 75 L. Ed. 1128; *Mintz* v. *Baldwin*, 289 U. S. 346, 77 L. Ed. 1245.

Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy. *Southern Pacific Company* v. *Arizona*, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915; *Aladdin Industries, Inc.* v. *Associated Transport, Inc.*, 42 Tenn. App. 52, 298 S. W. 2d 770.

Finding no pre-emption by Congress of the entire field of advertising in interstate commerce, and no conflict between federal legislation relating to false advertising, or to false or deceptive communications and our statute seeking to regulate truthful advertising as a health and welfare measure, we must determine whether Section 67-7-13 constitutes an obstruction on or direct interference with interstate commerce in violation of the federal constitution as contended by appellants.

As we construe Section 67-7-13, it contains no restrictions directed toward the regulation of interstate commerce. It does not prohibit the publication and circulation of appellants' newspaper in interstate commerce. It does not

prohibit or exclude the news media in this state from accepting advertising from citizens of other states for publication here and circulation in interstate commerce. It does not prohibit the advertising of optometric goods either in this state or in interstate commerce. It merely places a restriction, in the exercise of its police power, on the manner in which advertising in the field of optometry can be done within this state alone by "any person" and "by any means." Enjoining appellants from accepting and disseminating price-advertising by their news media in New Mexico for the benefit of a local business in Gaines County, Texas, does not affect the free flow of interstate commerce with respect to proper subjects of that commerce, or contracts for the dissemination of national or foreign news and information regarding proper subjects of commerce, as defined in the cases cited by appellants. We are in agreement with the line of reasoning, expressed in *State v. J. P. Bass Publishing Company*, 104 Me. 288, 71 A. 894, a state in which the sale or keeping for sale of intoxicating liquor was illegal, which involved a valid exercise of the police power prohibiting the advertising within the state of liquor sold or kept for sale without the state. The court said:

> "... If the state cannot wholly prevent the mischief of such advertisements by excluding from the state all newspapers containing them wherever published, it may yet prevent such increase and spread of the mischief as would result from such advertisements being printed in newspapers published within its own territory. It may to that extent control the conduct of printers and publishers within its own territory...."

Having determined that Section 67-7-13(m) does not constitute an obstruction on interstate commerce, we come to appellants' second contention that the statute is an unreasonable infringement of personal property rights and an unwarranted oppressive interference with their liberty

of contract in violation of the Constitutions of the United States and of New Mexico. In support thereof, appellants rely on the case of *Little v. Smith*, 124 Kan. 237, 257 Pac. 959 in which a statute prohibited the advertising of items legally for sale within the state. It seems clear to this court that the case is not in point since we are not dealing here with the prohibition of advertising but a reasonable police regulation of the manner in which the advertising can be done in this state. Appellants quote from *Little v. Smith*, as follows:

> "... A statute restraining the liberties and property rights of citizens cannot be upheld unless it has real relation to its object and the regulations reasonably adapted to accomplish the end sought to be attained. ..."

The court in that case found the absolute prohibition to be discriminatory, but we think there can be no question but that the valid exercise of the police power in this case has a real relation to the objects sought to be attained. As has been held by this court in *Green v. Town of Gallup*, 46 N. M. 71, 120 P. 2d 619, and *Mitchell v. City of Roswell*, 45 N. M. 92, 111 P. 2d 41, property and property rights are held subject to the fair exercise of the police power and a reasonable regulation enacted for the benefit of public health, convenience, safety or general welfare is not unconstitutional "taking of property" in violation of the contract clause, "due process" clause or "equal protection" clause of the Federal Constitution. Nor would it violate any constitutional rights guaranteed by the Constitution of New Mexico. See *Klein v. Department of Registration and Education*, 412 Ill. 75, 105 N. E. 2d 758.

We conclude as did the trial court, enjoining the appellants from aiding and abetting a non-resident in the violation of a law of New Mexico is as essential to the administration of the provision of our statutes relating to the

practice of optometry for the health and welfare of our citizens as would be the prosecution of a resident optometrist for the same offense.

The judgment should be affirmed. IT IS SO ORDERED.

s/ J. C. COMPTON
Chief Justice

WE CONCUR:

s/ DAVID W. CARMODY J.

s/ DAVID CHAVEZ, JR. J.

s/ M. E. NOBLE J.

J.

MOISE, J., not participating.

Appendix B

Order of the Supreme Court of the State of New Mexico affirming the Judgment of the District Court of Lea County, State of New Mexico.

Wednesday, April 11, 1962

NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY, *Plaintiff-Appellee,* vs. ABNER ROBERTS; AGNES K. HEAD, d/b/a LEA COUNTY PUBLISHING CO.; PERMIAN BASIN RADIO CORPORATION; and KWEW, INC., *Defendants-Appellants*	No. 7001 LEA COUNTY

This cause having heretofore been argued, submitted and taken under advisement, and the Court being now sufficiently advised in the premises announces its decision by Chief Justice Compton, Mr. Justice Carmody, Mr. Justice Chavez and Mr. Justice Noble concurring, Mr. Justice Moise not participating, affirming the judgment of the District Court for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED by the Court that the judgment of the District Court within and for the County of Lea, whence this cause came into this Court, be and the same is hereby affirmed, and the cause is remanded to the said District Court of [illegible] County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

Appendix C

1. Decree of the District Court of Lea County, State of New Mexico, as to Abner Roberts:

DECREE

THIS CAUSE came on to be heard on the 4th day of January, 1961; Plaintiff being represented by the Attorney General of New Mexico and by Robert F. Pyatt, Special Assistant Attorney General, and no one appearing for Defendant Abner Roberts; and it appearing to the Court that Defendant Abner Roberts was personally served with process in the State of Texas as provided by law; and Defendant Abner Roberts having failed to appear or answer the Complaint as required by law; and after examining the file and hearing the proof of Plaintiff, the Court finds:

1.

The allegations contained in Plaintiff's Complaint as to defendant Abner Roberts are true and the Court adopts such allegations as its findings of fact.

2.

Judgment should be entered as follows:

Enjoining and restraining Defendant Abner Roberts from advertising by any means whatsoever, within the State of New Mexico, the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings, or which in any other manner is violative of the provisions of Sec. 67-7-13(m), N.M.S.A., 1953 Compilation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

Defendant Abner Roberts is hereby enjoined and restrained from advertising by any means whatsoever, within

the State of New Mexico, the quotations of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings, or which in any other manner is violative of the provisions of Sec. 67-7-13 (m) N.M.S.A., 1953 Compilation.

/s/ JOHN R. BRAND

2. Transcript of proceedings in the District Court of Lea County, State of New Mexico:

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above entitled and numbered cause came on to be heard before the Honorable John R. Brand, District Judge in and for the Fifth Judicial District, Division III, State of New Mexico, on Thursday, January 19, 1961, in the District Court of Lea County, State of New Mexico; the Plaintiff appearing through its attorney, Assistant Attorney General, Robert F. Pyatt, Esquire; Defendants Agnes K. Head and KWEW, Inc. appearing through their attorney, L. George Schubert, Esquire, Hobbs, New Mexico; Defendant Permian Basin Radio Corporation appearing through its attorney, Theodore R. Johnson, Esquire, of Williams, Johnson & Houston, Hobbs, New Mexico; Defendant Abner Roberts not appearing; both sides announcing ready for trial, the following occurred, to-wit:

* * * * * *

BY THE COURT: The Legislature of New Mexico passed an act prohibiting the advertisement in any form of prices of various paraphenalia sold by optometrists. That is a justifiable and reasonable exercise of the police power, for obvious reasons. Optometry is a science dealing with the public health, and it is quite permissible that the State regulate it so as to attempt to insure that it be conducted in an ethical

manner without competition attending on the sale of other goods. The Defendant Roberts is a non-resident of the State of New Mexico and beyond the jurisdiction of this Court, and his activities can not be controlled by this Court. The three other defendants engage in disseminating news, advertising matter, by newspaper and radio. They are residents of this State and within its jurisdiction. Conceding that Roberts' acts are illegal and in violation of our law, I can see no persuasive reason why the defendants should not be restrained from aiding and abetting him in the illegal act. I do not think that either Little vs. Smith nor the Utah Case are in point. There, it was permissible to sell the items under certain licensing regulations. But, the State undertook to prevent advertisement by the merchants of the fact that they had these items for sale, for legal sale. Here, it is illegal to price-advertise these items. There is no provision whereby it can be made legal. These defendants are engaged in a conspiracy to assist the Defendant Roberts in violating a law of the State of New Mexico. It so happens that in a neighboring state, there is no such act. But, the State of New Mexico is not prohibited from doing what it can to protect its citizens because the State of Texas does not see fit to take similar action. The injunction will issue to the other three defendants as prayed.

3. Decision (Findings of Fact and Conclusions of Law) of the District Court of Lea County, State of New Mexico, as to Agnes K. Head, d/b/a, Lea County Publishing Co., Permian Basin Radio Corporation, and KWEW, Inc.

DECISION OF THE COURT

The Court makes the following

Findings of Fact

1. Plaintiff is an agency of the State of New Mexico and brings this suit in its official capacity. Defendant Roberts is a resident of the State of Texas. Defendant Agnes K. Head is a resident of Lea County, New Mexico, and does business in such county as Lea County Publishing

Company, publishing the "Hobbs Flare", a newspaper in Hobbs, New Mexico. Defendants Permian Radio Corporation and Kwew, Inc. are corporations authorized to transact business in New Mexico, and each operates a radio transmitting station in Hobbs, Lea County, New Mexico.

2. Defendant Roberts practices optometry in Gaines County, Texas. This practice is conducted just across the New Mexico-Texas boundary, a few miles east of Hobbs, New Mexico.

3. Defendant Roberts has for some period of time conducted radio and newspaper advertising through the news media of the other defendants in this case. Such advertising consists of the quotation of prices on eyeglasses and spectacles and of the quotation of discounts to be offered on eyeglasses and spectacles. This advertising is published by the other defendants, which publishing originates in Hobbs, Lea County, New Mexico.

4. This advertising will be continued, unless permanently enjoined.

5. All defendants with the exception of Defendant Abner Roberts have been personally served with process within the State of New Mexico.

The Court adopts the following

Conclusions of Law

1. By virtue of the terms of Section 67-7-4, N. M. S. A. 1953 Comp., as amended, it is the duty of plaintiff to administer those statutes of the State of New Mexico pertaining to the practice of optometry, compiled as Sections 67-7-1 to 67-7-14, N. M. S. A. 1953 Comp., both inclusive as amended.

2. The advertising done by the Defendant Roberts and published through the newspaper and radio media of the other defendants in this case is directly in violation of

Section 67-7-13, N. M. S. A. 1953 Comp., which is one of the statutes required to be administered by the plaintiff.

3. The publication of the advertising by the defendants in this cause constitutes a violation of Section 67-7-13, N. M. S. A. 1953 Comp.

4. The defendants in this case, other than defendant Roberts, in publishing such advertising, are within the jurisdiction of the laws of the State of New Mexico, and are within the jurisdiction of this Court, and are amenable to its process.

5. The defendants in this case, other than defendant Roberts, in publishing such advertising, are aiding and abetting in, and encouraging the violation of Section 67-7-13, N. M. S. A. 1953 Comp., and such conduct by them should be permanently enjoined.

6. The enforcement of Section 67-7-13, N. M. S. A. 1953, Comp., by enjoining the defendants, other than defendant Roberts, from aiding and abetting in the violation of this section does not offend either the Constitution of the United States or the Constitution of New Mexico.

7. The granting of injunctive relief against all defendants, other than defendant Roberts, is not affected by the fact that defendant Roberts is a resident of Gaines County, Texas.

8. The provisions of Section 67-7-13, N. M. S. A. 1953, Comp., prohibiting certain price advertising and discount advertising are a valid exercise by the Legislature of the State of New Mexico of the police power, having been enacted in protection of the public health and welfare. These provisions do not offend either the Constitution of the United States or the Constitution of New Mexico.

9. Plaintiff has no plain, speedy, or adequate remedy at law, and injunctive relief is necessary.

All requested findings of fact and conclusions of law submitted by the parties and not adopted are hereby refused.

DONE This the 28th day of March, 1961.

/s/ JOHN R. BRAND
District Judge

4. Final Decree of the District Court of Lea County, State of New Mexico, as to Agnes K. Head, d/b/a Lea County Publishing Co., Permian Basin Radio Corporation and KWEW, Inc.:

FINAL DECREE

THIS CAUSE came on to be heard on the 19th day of January, 1961, defendants Agnes K. Head, d b/a Lea County Publishing Co., and KWEW, Inc., being represented by L. George Schubert, and defendant Permian Basin Radio Corporation being represented by Theodore R. Johnson of Williams, Johnson & Houston; and plaintiff being represented by the Attorney General of New Mexico and by Robert F. Pyatt, Special Assistant Attorney General; and the parties having entered into stipulations herein as to the facts of the case and the Court having made and filed its Findings of Fact and Conclusions of Law.

1.

The Court has jurisdiction of the subject matter and of defendants Agnes K. Head, d b/a Lea County Publishing Co., KWEW, Inc., and Permian Basin Radio Corporation, and of plaintiff New Mexico Board of Examiners in Optometry; that judgment should enter for the plaintiff granting the injunctive relief prayed for in its complaint against said defendants.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED as follows:

Defendants Agnes K. Head, d/b/a Lea County Publishing Co., KWEW, Inc., and Permian Basin Radio Corporation are hereby perpetually enjoined and restrained from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eyeglasses, spectacles, lenses, frames, or mountings or which quotes discounts to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes moderate prices, low prices, lowest prices, guaranteed glasses, satisfaction guaranteed or words of similar import, as prohibited by the provisions of Section 67-7-13(m), 1953 Compilation, to all of which the defendants object and except.

/s/ JOHN R. BRAND
District Judge

SUBMITTED:

/s/ ROBERT F. PYATT
Robert F. Pyatt, Special Assistant
Attorney General

/s/ L. GEORGE SCHUBERT
L. George Schubert, Attorney for
Agnes K. Head, d/b/a Lea County
Publishing Co., and KWEW, Inc.

/s/ THEODORE R. JOHNSON
Theodore R. Johnson, Attorney for
Permian Basin Radio Corporation

Appendix D

Section 67-7-13, New Mexico Statutes Annotated, 1953 Compilation:

"67-7-13. Offenses—Penalties.—Each of the following acts on the part of any person shall constitute a misdemeanor and shall be punished by a fine of not less than $50.00 nor more than $200.00 or imprisonment in the county jail for not less than 30 days nor more than six (6) months, or both such fine and imprisonment for the first offense, and for a second offense a fine of not less than $200.00 nor more than $500.00, or imprisonment in the county jail for not less than 90 days nor more than (1) year, or both such fine and imprisonment. All fines thus received shall be paid into the common school fund of the county in which such conviction takes place.

(a) The practice of optometry, or an attempt to practice optometry without a duly authorized certificate of registration as an optometrist issued by the New Mexico state board of optometry as provided in this act (67-7-1 to 67-7-14), and signed by the president and secretary of said board.

(b) Permitting any person in one's employ, supervision or control to practice optometry unless that person has a certificate of registration, as provided in this act.

(c) Obtaining, or attempting to obtain, a certificate of registration to practice optometry unless that person has a certificate of registration, as provided in this act.

(d) The making of a willfully false oath or affirmation whenever an oath or affirmation is required by this act.

(e) Falsely impersonating an optometrist of like or different name.

(f) By selling or fraudulently obtaining any optometry diploma, license, record or certificate or aiding or abetting therein.

(g) Using in connection with his name any designation tending to imply that he is a practitioner of optometry, if not the holder of a certificate of registration under the provisions of this act.

(h) Practicing optometry during the time his certificate of registration shall be suspended or revoked.

(i) Either in person or by or through solicitors or agents giving or offering to give to any person eyeglasses, spectacles or lenses, either with or without frames or mountings, as a premium or inducement for any subscription to any book, set of books, magazines, magazine, periodical or other publication, or as a premium or inducement for the purchase of any goods, wares or merchandise.

(j) Except licensed and registered optometrists and licensed and registered physicians and surgeons, having possession of any trial lenses, trial frames, graduated test cards or other appliances or instruments used in the practice of optometry for the purpose of examining the eyes or rendering assistance to anyone who desires to have an examination of the eyes, or selling lenses or duplicating or replacing broken lenses in spectacles or eyeglasses, except upon the prescription of a regularly licensed and registered optometrist or physician and surgeon.

(k) The making of a house to house canvass either in person or through solicitors or associates for the purpose of selling, advertising or soliciting the sale of eyeglasses, spectacles, lenses, frames, mountings, eye examinations or optometrical services.

(l) The peddling of eyeglasses, spectacles or lenses from house to house or on the streets or highways, notwithstanding any law for the licensing of peddlers.

(m) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discount to be offered

on eyeglasses, spectacles, lenses, frames or mountings or which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import.

(n) The violation of any of the provisions of this act for which the penalty has not been elsewhere provided in this act."